IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 13-0789

MEA-MFT, the Montana State AFL-CIO, the Montana Public Employees Association, the Montana Human Rights Network and the American Federation of State, County and Municipal Employees,

Petitioners,

v.

STATE OF MONTANA HONORABLE TIM FOX, in his capacity as Attorney General,

Respondent.

ATTORNEY GENERAL'S BRIEF OPPOSING THE PETITION CHALLENGING THE LEGAL SUFFICIENCY OF LR-127

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Pursuant to Mont. Code Ann. § 13-27-316(2) and as requested by this Court's December 10, 2013 order, the Attorney General of the State of Montana hereby offers this brief opposing the above-captioned petition filed November 27, 2013.[1]

STATEMENT OF THE ISSUES

1. Should the Attorney General have determined that LR-127's bill title exceeds the 100-word statutory limit and declared it legally insufficient and void?

2. Should the Attorney General have found that LR-127 violates the single subject rule and declared it legally insufficient and void?

3. Is the ballot statement written by the Attorney General true and impartial?

STATEMENT OF THE FACTS

Legislative Referendum No. 127 (LR-127) is an act to generally revise Montana's election laws that the 2013 Legislature referred to Montana voters for the 2014 general election. The specific purpose of LR-127 is to establish a top-two

[1] On December 10, 2013, the Court asked both Petitioners and the Attorney General to provide "further briefing" on the issues presented in this case. So far Petitioners have only filed their Petition in this case, which the Attorney General already responded to on December 5, 2013. Thus, this brief mostly restates the arguments already presented in that earlier brief. If the Court would like the Attorney General to respond to new arguments made by Petitioners in their brief filed alongside this brief, he would be happy to do so upon order of the Court.

primary system in Montana,[2] where the two candidates with the most votes proceed to the general election regardless of political party preference.

To establish such a system, a number of amendments were included to avoid inconsistencies in the code. Those amendments include changes to filing of recall petitions, appointment procedures, vacancies, election judge selection, candidacy declarations, write-in candidates, candidate withdrawals, ballot form, nominations, candidate registration, certification of election result, and more. These amendments all fall within the general purpose of the Act, which is to generally revise Montana election laws to establish a top-two primary system.

Senate Bill 408 (Olson – Roundup) passed through the Legislature with the necessary votes in the 2013 Legislative Session in order to refer this matter to voters in the 2014 general election. Following the session, the Attorney General conducted a legal sufficiency review pursuant to Mont. Code Ann. § 13-27-312. As required by law, the Attorney General's Office prepared a draft statement of purpose and implication, because the Legislature did not provide one. *See* Mont. Code Ann. § 13-27-315. After soliciting public comment from interested parties, the Attorney General made modifications to the proposed statement of purpose and implication. At the end of the 30-day statutory timeframe, the Attorney General

[2] With the exception of party precinct elections and presidential primary elections.

informed the Secretary of State that LR-127 did not conflict with another ballot issue that may appear in the same election, was legally sufficient to be referred to voters, and forwarded the final statement of purpose and implication.

The Attorney General's office was served by U.S. mail with the Petitioner's suit challenging the Attorney General's legal sufficiency review and the statement of purpose and implication. The Secretary of State's Office was not named in the Petition.[3] Petitioners have asked the Court to find that the proposed issue does not comply with statutory and constitutional requirements governing submission of the issue to the electors, that the issue is void, and that it may not appear on the ballot.

STANDARD OF REVIEW

The Supreme Court of the State of Montana has original jurisdiction in this matter pursuant to Mont. Code Ann. §§ 3-2-202 (3)(a) and 13-27-316.

ARGUMENT

Petitioners challenge the determination of legal sufficiency of LR-127, claiming that the Attorney General failed to properly review the ballot issue. Specifically, Petitioners allege that the Attorney General should have rejected the

[3] The Petitioners have asked that LR-127 be removed from the ballot, which would require the Secretary of State to be a party to this action. The Secretary of State oversees matters involving ballots and election procedures.

referendum from the Legislature because its title has more than 100 words, in violation of Mont. Code Ann. § 5-4-102. Petitioners' cramped and unwarranted interpretation of Mont. Code Ann. § 5-4-102 would lead to a deprivation of voters' constitutional rights to vote on matters referred by the Legislature. The statutory references, which are required to appear in a bill's title, should not be considered words under Mont. Code Ann. § 5-4-102.

Petitioners' allegation that LR-127 contains more than one subject likewise lacks merit because all amendments within the ballot issue are consistent with its express purpose to generally revise election laws to establish a top-two primary system. Petitioners' nominal challenge to the ballot statement language is also inadequate as they have failed to propose an alternate ballot statement, as required by Mont. Code Ann. § 13-27-316(3)(b). For these reasons, the petition for review should be denied.

I. THE ATTORNEY GENERAL'S LEGAL SUFFICIENCY REVIEW IS LIMITED BECAUSE THERE ARE STRONG CONSTITUTIONAL ARGUMENTS SUPPORTING THE PEOPLE'S RIGHT TO VOTE ON MATTERS REFERRED BY THE LEGISLATURE.

This Court has long recognized that the referendum provision of the Montana Constitution "should be broadly construed to maintain the maximum power in the people." *Reichert v. State*, 2012 MT 111, 365 Mont. 92, 278 P.3d 455

(Baker, J., dissenting) (quoting *Nicholson v. Cooney*, 265 Mont. 406, 411, 877 P.2d 486, 488 (1994)). It has noted that "judicial intervention in referenda or initiatives prior to an election is not encouraged." *Cobb v. State*, 278 Mont. 307, 310, 924 P.2d 268, 269 (1996). To effectively protect and preserve the rights which Montanans have reserved to approve or reject through the referendum process, pre election review should be very deferential. *Harper v. Greely*, 234 Mont. 259, 267-68, 763 P.2d 650, 655-56 (1988). In the few cases where a referendum has been struck, this Court has determined that the proposed ballot issue clearly violates statutory or constitutional requirements, such as where the measure is "unquestionably and palpably unconstitutional on its face." *State ex. rel. Steen v. Murray*, 144 Mont. 61, 69, 394 P.2d 761, 765 (1964).

To the Attorney General's knowledge, the Court has yet to find that a referendum was improperly reviewed by the Attorney General in light of the narrow powers and duties assigned to the office in the legal sufficiency review process. The Attorney General is charged only with "examin[ing] the proposed [ballot] issue for legal sufficiency . . . ." Mont. Code Ann. § 13-27-312(1). This legal sufficiency analysis includes assessing whether "the petition complies with statutory and constitutional requirements governing submission of the proposed issue to the electors." Mont. Code Ann. § 13-27-312(7). In other words, the legal sufficiency analysis is limited to a procedural review as to the legal form of the

proposed initiative. *See Montanans Opposed to I-166 v. Bullock*, 2012 MT 168, 365 Mont. 520, 285 P.3d 435. The Court has reinforced the limited and narrow scope of this legal sufficiency review, and construed statutes in a way that promotes, rather than curtails, the people's right of direct democracy. *Id.*, ¶ 13 (Baker, J., concurring). Attorney General review serves as an early-warning system, identifying and disqualifying nonsubstantive legal deficiencies regarding submission of the petition to voters, while leaving close, substantive questions to later judicial review rather than short-circuiting the democratic process at the earliest stage.

The statutory requirements that guide legal sufficiency review are set out in Mont. Code Ann. §§ 13-27-201 and -204, which provide for the form of the petition. Within the Montana Constitution, article III, section 5 provides that the subject of the initiative may encompass "all matters except appropriations of money." LR 127 met these requirements, and thus the Attorney General certified it as legally sufficient.

II. SECTION 5-4-102 SHOULD NOT BE CONSTRUED IN A WAY THAT LIMITS THE PEOPLE'S CONSTITUTIONAL RIGHT TO VOTE ON MATTERS REFERRED BY THE LEGISLATURE.

Petitioners' first challenge to the Attorney General's legal sufficiency review relates to the length of the referendum's title as passed by the 2013

Legislature. Petitioners allege the title exceeds 100 words in violation of Mont. Code Ann. § 5-4-102 because the title contains 196 words.[4] Since they believe the referendum's title violates Mont. Code Ann. § 5-4-102, Petitioners assert the Attorney General should have deemed LR-127 legally insufficient and prevented it from going on the ballot.[5] Petitioners' theory is an overly strict and unwarranted interpretation of Mont. Code Ann. § 5-4-102 that would lead to an unconstitutional barrier for Montana voters to exercise their expansive state constitutional right to vote on matters referred by the Legislature.

Article III, section 5 of the state constitution gives Montanans the right to vote on "any act of the legislature except an appropriation of money." (Emphasis added.) But Petitioners are asking this Court to void LR-127 to prevent Montana voters from exercising their constitutional right to vote merely due to the length of the referendum's title. Such a determination would be unprecedented and infringe on a right guaranteed by the state constitution.

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[4] The Attorney General is unsure how Petitioners came up with the 196-word total, but it may have been, in part, through an assumption that a statutory reference, which includes chapter, part and section numbers, is only one word for purposes of § 5-4-102.

[5] Other referenda, including LR-111 (1993) and LR-115 (2000), exceeded the 100-word limit and were deemed legally sufficient by the Attorney General to move forward for consideration of Montana voters. LR-111 only had more than 100 words when statutory references were included. LR-115 had more than 100 words without including statutory references.

If Petitioners' arguments are accepted by the Court, Montanans would be unable to vote on any matter, no matter how simple, that would require minor technical amendments to many sections of code, solely because the bill title could not be shortened. For example, if an initiative or referendum were proposed to change a potentially offensive word that appeared throughout the code, it would be impossible to do so if the offensive word was present in more than 100 sections. Such a simple concept could not go forward for a vote of the people because it would be impossible to construct a title according to Mont. Code Ann. § 5-4-102 through Petitioner's reasoning.

The Court is not required to adopt an interpretation of Mont. Code Ann. § 5-4-102 that would put it in conflict with article III, section 5. When a statute is equally susceptible of two interpretations, the one in favor of a natural right should be adopted. Mont. Code Ann. § 1-2-104. The Court's practice is to avoid unconstitutional interpretations by adopting reasonable interpretations of statutes. *See Montana Sports Shooting Ass'n v. State*, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003; *State v. Samples*, 2008 MT 416, ¶ 14, 347 Mont. 292, 198 P.3d 803. Because Mont. Code Ann. § 5-4-102 is reasonably susceptible of a constitutional interpretation that would exclude statutory references from the word count in the bill title, this Court should hold that the referendum should move forward to the voters.

The doctrine of constitutional avoidance would counsel against Petitioners' preferred interpretation, even if it were more reasonable. But it isn't, especially when considered in the light of Montana law and traditional bill drafting practices. Montana law requires bill titles to fully list every amended section within the bill.

> . . . [R]eference in the title of the amendatory Act to the subject matter of the section to be amended need not be so comprehensive as to constitute a complete index to or abstract of the section. "All that is required in such case is a reasonable degree of certainty as to the statute to be amended."

See *State v. Duncan*, 74 Mont. 428, 240 P. 978 (1925). In other words, while there is a certain level of flexibility in the summary of the bill contents within the title, a drafter must list, section by section, the specific statutes being amended within the bill text. Since flexibility exists in how a bill title may summarize the bill contents, it is consistent with Mont. Code Ann. § 5-4-102 and article III, section 5 to apply the 100-word limit to the word summary for a referendum's title, but not the string of statutes amended.

The Legislature did not provide guidance as to how to calculate the number of words in a referendum title for purposes of Mont. Code Ann. § 5-4-102, but other areas in the code support the position that statutory references are not words. Words and phrases must be construed according to the context and approved usage of the language. Mont. Code Ann. §§ 1-2-106 and -107. Therefore, words are susceptible to different meanings or definitions. *Id.* Statutory references are not

susceptible to ambiguity like words because are they are just citations. Much like a footnote call is not a word, statutory citations should not be considered words for purposes of Mont. Code Ann. § 5-4-102. This is consistent with the advice given by the Code Commissioner during the 2013 Legislative Session when this very question was raised. *See* Exhibit A.

LR-127's title does not exceed 100 words if statutory references are excluded. In its legal sufficiency review, the Attorney General's office errs on the side of preserving the right of the people to vote. The Court should do the same. Accordingly, the Court should not void LR-127 based on the inclusion of statutory cites in the title, or interpret the word limit in such a way that conflicts with the people's power and right to vote on non-appropriation matters referred by the Legislature.

III. LR-127 SATISFIES THE SINGLE SUBJECT RULE.

Petitioners argue that LR-127 contains two separate, independent political questions in violation of article V, section 11(3). As a result, they assert the Attorney General should have deemed the referendum legally insufficient and prevented the measure from proceeding to Montana voters in the 2014 general election.

It is not entirely clear if either the single amendment (article XIV, section 11) or the single subject (article V, section 11(3)) rule is properly considered under pre-election legal sufficiency review. This Court, under the 1889 Constitution, held that an initiative considered in a pre-election original proceeding "in separate parts . . . would fail because . . . it would contain more than one subject . . . ." *Steen*, 144 Mont. at 66, 394 P.2d at 764 (1964).

Twenty years later under the 1972 Constitution, this Court held that "multiplicity [of subjects] is not a proper basis for this Court's intervention in the initiative process prior to election" because it "does not constitute the type of question of unconstitutionality on the face of the Initiative . . . ." *State ex rel. Montana Citizens for Preservation of Citizens' Rights v. Waltermire*, 224 Mont. 273, 277, 729 P.2d 1283, 1286 (1986). In a challenge to the Attorney General's legal sufficiency review for I-166 (the corporate personhood initiative), the Court did not address the opponents' arguments that the initiative violated the single-subject requirement of article V, section 11(3). *See Montanans Opposed to I-166 v. Bullock*, 2012 MT 168, 365 Mont. 520, 285 P.3d 435. Given this precedent, the Attorney General's practice has been to only reject an initiative or referendum where it clearly and unquestionably contains multiple subjects on its face.

When a challenge arises based on the single subject requirement found in article V, section 11(3) of the Montana Constitution, the Court has stated: "Sound policy and legislative convenience dictate a liberal construction of the title and subject-matter of statutes to maintain their validity. Infraction of this constitutional clause must be plain and obvious to be recognized as fatal." *Rosebud County v. Flinn*, 109 Mont. 537, 544, 98 P.2d 330, 334 (1940). The purpose of the single subject rule is "to prevent the practice of embracing in the same bill incongruous matters which have no relation to each other or to the subject specified in the title so that measures may not be adopted without attracting attention to them." *Montana Auto. Ass'n v. Greely*, 193 Mont. 378, 398, 632 P.2d 300, 311 (1981) (emphasis added).

Petitioners allege that LR-127 violates article V, section 11(3), because it requires voters to decide two separate, independent political questions with a single vote: (1) adoption of an open primary system; and (2) a proposal that the top two political candidates advance to the general election, regardless of party affiliation. Petitioners fail to explain how these issues do not relate to each other, or to the bill's stated purpose of generally revising Montana election laws to create a top two primary system. They only include a cursory assertion that LR-127 does not constitute a bill for the general revision of the laws within the meaning of that phrase in article V, section 11(3).

LR-127 proposes an act to generally revise Montana elections to create a top-two primary system. It sets up a primary system that allows the two candidates with the most votes in a particular contest to move forward to the general election regardless of political party preference. To accomplish this new top-two primary system, there are several related changes consistent with the overall purpose of the referendum--changes which are necessary or incidental to adopting a functional top-two primary system. The revisions within the referendum thus relate to each other and embrace the same general subject of revising Montana elections to establish a top-two primary system. Therefore, LR-127 does not violate the single subject rule.

The Petitioners' limited interpretation of the single subject rule would have enormous consequences and inject dangerous uncertainty for non-appropriation bills in the Legislature, which are likewise required to comply with article V, section 11(3). Without general revisions of bills that affect a particular area of law, the biennial lawmaking process would be a fragmented, piecemeal endeavor that would result in vast inconsistencies and a disjointed code. The same is true for laws proposed through the initiative and referendum process. Petitioners' sharp application of the single-subject rule would also make it practically impossible for Montana citizens to ever vote on anything referred by the Legislature other than absurdly simple matters. This construction flies in the face of the foundational

principle in article II, section 1 (vesting all political power in the people) and article III, section 5's clear requirement that Montanans possess the right to vote on "any act of the legislature except an appropriation of money." (Emphasis added.)

Petitioners' arguments regarding multiple subjects within LR-127 should be rejected.

IV. THE BALLOT STATEMENTS ARE TRUE AND IMPARTIAL AND PETITIONERS HAVE FAILED TO SUBMIT AN ALTERNATE BALLOT STATEMENT AS REQUIRED BY LAW.

Montana law requires that:

> The ballot statements must express the true and impartial explanation of the proposed ballot issue in plain, easily understood language and may not be arguments or written so as to create prejudice for or against the issue.

Mont. Code Ann. § 13-27-312(4). A ballot statement challenge is not an opportunity for the Court or opponents of a ballot issue to express their preferences for other language that in their view may better express how they see a particular referendum. "To foreclose the prospect of endless and subjective challenges," the Court will uphold ballot statements that meet the basic statutory requirements. *Stop Over Spending v. McGrath*, 2006 MT 178, ¶ 18, 333 Mont. 42, 139 P.3d 788.

Therefore, as long as the Attorney General's wording "fairly states to the voters what is proposed within the Initiative, discretion as to the choice of language . . . is entirely his." *State ex rel. Wenzel v. Murray*, 178 Mont. 441, 448,

585 P.2d 633, 637-38 (1978); *cf. Harper v. Greely*, 234 Mont. 259, 269, 763 P.2d 650 (1988) (rejecting challenge to referendum ballot statements even though "the language may not be the best conceivable statement"). Petitioners do not, and could not, claim that the Attorney General's ballot statements amount to the kind of "fraud upon the electorate" that would not deserve such deference. *Sawyer Stores v. Mitchell*, 103 Mont. 148, 164, 62 P.2d 342 (1936) (holding misleading a ballot title that failed to mention more than 30-fold increases in certain license fees, or define the businesses to which the increases applied). Absent untruth, partiality, argumentation, or prejudice in the ballot statements, this Court has not and should not intervene in this process.

Petitioners have not in any event proposed to the Court in their petition an alternative statement of purpose and implication that, in their view, better summarizes the provisions of LR-127. Doing so is a requirement of Mont. Code Ann. § 13-27-316(3)(b) when challenging an Attorney General's statement of purpose and implication. Providing a 135-word summary of initiatives is a difficult task for any ballot measure, which may be why Petitioners failed to provide an alternate version. The statutory limit of 135 words dictates that the statement will provide only a general overview of the ballot issue, not a full annotation, as Petitioners apparently prefer.

Since Petitioners have failed to allege untruth, partiality, argumentation, or prejudice in the ballot statement, and because they did not provide an alternate ballot statement pursuant to Mont. Code Ann. § 13-27-316(3)(b), the Court should reject their arguments regarding the statement of purpose and implication.

CONCLUSION

For the reasons stated above, Petitioners' arguments regarding the Attorney General's legal sufficiency review have no merit. The petition should be denied, and LR-127 should proceed to a vote of the people.

Respectfully submitted this 9th day of January, 2014

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellee to be mailed to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,593 words, excluding certificate of service and certificate of compliance.

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JON BENNION